

FILED

JAN 22 2002

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

CALIFORNIA PRO-LIFE COUNCIL,
INC.,

Plaintiff,

v.

KAREN GETMAN, et al.,
Defendants.

NO. CIV. S-00-1698 FCD/GGH

MEMORANDUM AND ORDER

-----oo0oo-----

Plaintiff in this action is the California Pro-Life Council ("CPLC"). Defendants are: Bill Lockyer, Attorney General of the State of California; Karen Getman, Chairman of the California Fair Political Practices Commission ("FPPC"); and William Deaver, Kathleen Makel, Carol Scott, and Gordona Swanson, members of the FPPC.¹ The parties have filed cross-motions for summary

¹ The original complaint also named Jan Scully, District Attorney of Sacramento in her official capacity and as a representative of a class of district attorneys in the State of California, and Samuel L. Jackson in his official capacity as City Attorney of Sacramento and as a representative of a class of city attorneys in the State of California. These defendants have since been dismissed.

1 judgment² on the issue of whether Cal. Gov't Code § 82031 and its
2 implementing regulations, Cal. Code Regs. tit. 2, § 18225(b)
3 violate CPLC's and other organizations' First and Fourteenth
4 Amendment³ rights because they are unconstitutionally vague. For
5 the reasons set forth below, the CPLC's motion is denied and
6 Defendants' motion is granted.

7 **FACTUAL BACKGROUND⁴**

8 **1. CPLC**

9 CPLC is a non-profit corporation. Its corporate purpose as
10 stated in its articles of incorporation is "to promote the social
11 welfare and the protection of all human life." To further its
12 purpose, CPLC spends money for various types of communications to
13 the general public in which it discusses public issues that are
14 important to it. The money for these communications comes from
15 its general treasury. Among CPLC's communications are "voter
16 guides." See Amended Verified Complaint, Ex. C, filed September
17 27, 2000, for an example of a voter guide distributed by CPLC in
18 the past. The voter guides disseminated by CPLC in the past
19 addressed both candidates and ballot measure initiatives. They

21 ² Defendant Bill Lockyer has filed a motion for summary
22 judgment. Defendants Karen Getman, in her official capacity as
23 Chairman of the Fair Political Practices Commission ("FPPC"), and
24 Sheridan Downey III, Thomas S. Knox, Carol D. Scott, and Gordana
25 Swanson, in their official capacities as members of the FPPC,
filed notice that they join Defendant Lockyer's motion for
summary judgment and opposition to CPCL's motion for summary
judgment.

26 ³ The First Amendment is made applicable to the states by
the Fourteenth Amendment.

27 ⁴ The factual background is drawn in large part from the
28 court's Memorandum and Order granting in part and denying in part
Defendants' motion to dismiss, filed October 24, 2000.

1 reported the positions of seemingly all candidates running for
2 office in California on issues concerning abortion and/or
3 physician-assisted suicide and urged readers to vote a certain
4 way on ballot measure initiatives, e.g. "Vote **YES** on Prop. 3."
5 The voter guides are contained within a publication entitled the
6 "California ProLife News." See id. In addition to the voter
7 guides, this publication also contains articles, such as an
8 article entitled "Proposition 226 Protects the Rights of Pro-Life
9 Union Members." See id.

10 **2. California statutes in dispute**

11 The PRA was enacted by initiative measure (Proposition 9) in
12 1974, and took effect in 1975. One of its stated purposes is the
13 full and truthful disclosure of receipts and expenditures in
14 election campaigns "in order that the voters may be fully
15 informed and improper practices may be inhibited." Cal. Gov.
16 Code § 81002(a). Accordingly, organizations deemed "independent
17 expenditure committees" and/or "recipient committees" are
18 required to make certain disclosures concerning, among other
19 things, their expenditures and contributions.

20 Under the PRA, a "committee" includes "any person or
21 combination of persons who directly or indirectly . . . (a)
22 Receives contributions totaling one thousand dollars (\$1,000) or
23 more in a calendar year [or] (b) Makes independent expenditures
24 totaling one thousand dollars (\$1,000) or more in a calendar
25 year." Cal. Gov. Code § 82013(a), (b).

26 An "independent expenditure" is defined as:
27 an expenditure made by any person in connection with a
28 communication which expressly advocates the election or
defeat of a clearly identified candidate or the

1 qualification, passage or defeat of a clearly
2 identified measure, or taken as a whole and in context,
3 unambiguously urges a particular result in an election
but which is not made to or at the behest of the
affected candidate or committee.

4 Id. § 82031 (emphasis added). The implementing regulations,
5 Section 18225(b)(2) of Title 2 of the California Code of
6 Regulations, similarly provides that:

7 [a] communication "expressly advocates" the nomination,
8 election or defeat of a candidate or the qualification,
9 passage or defeat of a measure if it contains express
10 words of advocacy such as "vote for," "elect,"
11 "support," "cast your ballot," "vote against,"
"defeat," "reject," "sign petitions for" or otherwise
refers to a clearly identified candidate or measure so
that the communication, taken as a whole, unambiguously
urges a particular result in an election.

12 Cal. Code Regs. tit. 2, § 18225(b)(2) (emphasis added).

13 CPLC contends that the above italicized portions of Cal.
14 Gov't Code § 82031 and Cal. Code Regs. tit. 2, § 18225(b)(2) are
15 unconstitutionally vague.

16 PROCEDURAL BACKGROUND

17 In an order filed October 24, 2000, this court dismissed
18 Counts 1, 2, 3, 4, and 6 of CPLC's Amended Verified Complaint.
19 The court also dismissed Counts 5 and 10 to the extent they are
20 directed to regulation of communications involving candidates and
21 mere discussion of ballot measure initiatives. However,
22 dismissal of Counts 5 and 10 were denied to the extent they are
23 directed at express ballot measure advocacy. Counts 7, 8, and 9
24 were dismissed by stipulation of the parties. Therefore, the
25 remaining portions of Counts 5 and 10 form the basis of the
26 motions currently before the court.

27 In a separate order filed October 24, 2000, this court also
28 denied CPLC's motion for a preliminary injunction and denied its

1 motion for class certification as moot.

2 **STANDARD**

3 The Federal Rules of Civil Procedure provide for summary
4 adjudication when "the pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with
6 affidavits, if any, show that there is no genuine issue as to any
7 material fact and that the moving party is entitled to a judgment
8 as a matter of law." Fed. R. Civ. P. 56(c). One of the
9 principal purposes of the rule is to dispose of factually
10 unsupported claims or defenses. Celotex Corp. v. Catrett, 477
11 U.S. 317, 325 (1986).

12 In considering a motion for summary judgment, the court must
13 examine all the evidence in the light most favorable to the
14 non-moving party. United States v. Diebold, Inc., 369 U.S. 654,
15 655 (1962). If the moving party does not bear the burden of
16 proof at trial, he or she may discharge his burden of showing
17 that no genuine issue of material fact remains by demonstrating
18 that "there is an absence of evidence to support the non-moving
19 party's case." Celotex, 477 U.S. at 325. Once the moving party
20 meets the requirements of Rule 56 by showing there is an absence
21 of evidence to support the non-moving party's case, the burden
22 shifts to the party resisting the motion, who "must set forth
23 specific facts showing that there is a genuine issue for trial."
24 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).
25 Genuine factual issues must exist that "can be resolved only by a
26 finder of fact, because they may reasonably be resolved in favor
27 of either party." Id. at 250. In judging evidence at the
28 summary judgment stage, the court does not make credibility

determinations or weigh conflicting evidence. See T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985); Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

ANALYSIS

Ripeness

The Ninth Circuit recently addressed the issue of ripeness in a First Amendment setting in its en banc opinion in Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000). In Thomas, landlords who refused to rent to unmarried couples brought an action against the city's equal rights commission seeking declaratory and injunctive relief, and alleging that enforcement of Alaska's antidiscrimination laws against them would violate their free speech and free exercise of religion rights.

The Ninth Circuit in Thomas pointed out that ripeness is "'peculiarly a question of timing,' . . . designed to 'prevent courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" Thomas, 220 F.3d at 1138 (internal citations omitted). Since the doctrine of ripeness is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise

1 jurisdiction," ripeness is based on both a constitutional and
2 prudential component. Id. (internal citations omitted).

3 The Ninth Circuit in Thomas found that ripeness is subject
4 to the constitutional case or controversy requirement and that
5 "neither the mere existence of a prescriptive statute nor a
6 generalized threat of prosecution satisfies the requirement. Id.
7 at 1139. "Rather, there must be a 'genuine threat of imminent
8 prosecution.'" Id. (internal citations omitted). The court in
9 Thomas articulated three factors that are used in evaluating
10 whether a plaintiff faces a imminent threat of prosecution: (1)
11 whether the plaintiffs have articulated a "concrete plan" to
12 violate the law in question; (2) whether the prosecuting
13 authorities have communicated a specific warning or threat to
14 initiate proceedings; and (3) the history of past prosecution or
15 enforcement under the challenged statute.

16 As to the first Thomas requirement, CPLC claims that it has
17 articulated a "concrete plan" through its stated intention to
18 make future communications that simply discuss ballot measures in
19 close proximity to an election but do not advocate the passage or
20 defeat of a ballot measure in express or explicit words. See
21 Pl.'s Brief Opposing Defs.' Mot. at 11-12. CPLC also argues that
22 the third Thomas requirement is satisfied because FPPC advisory
23 opinions demonstrate that Defendants are actively enforcing the
24 challenged statutes. See Brief in Supp. of Pl.'s Mot. at 21-26.
25 CPLC further argues that the challenged statutes and Defendants'
26 enforcement of the statutes result in a "chilling" effect on
27 CPLC's speech.

28 However, CPLC cannot satisfy the second Thomas requirement.

1 CPLC has offered no evidence that the Defendants have evinced an
2 intent to prosecute CPLC. On the contrary, Defendants state that
3 the California Attorney General is not investigating CPLC for any
4 possible violations of the PRA, and has not threatened CPLC with
5 prosecution for any PRA violations. Furthermore, if such
6 violations were suspected, they would be first referred to the
7 FPPC and the FPPC has not issued any warning to CPLC that the
8 FPPC plans to initiate enforcement proceedings.

9 In addition, Defendants argue that CPLC has not fallen
10 within the scope of the challenged statutes in the past and there
11 is no evidence that this will occur in the future. CPLC has
12 stipulated that it does not reach the threshold amounts required
13 to trigger action under the statutes and has provided no evidence
14 that it plans to spend more than \$1,000 on ballot initiative
15 advocacy in the future. See Def. Lockyer's Reply at 10. Indeed,
16 the parties filed stipulations, approved by this court, that
17 CPLC's expenditures did not rise to the \$1,000 jurisdictional
18 threshold to trigger the challenged provisions. See Stipulation
19 of Dismissal for Counts 7, 8, and 9, filed September 20, 2001.

20 On the record before it, the court cannot identify any
21 evidence that CPLC faces a credible threat of prosecution, the
22 second of the Thomas requirements. The court therefore finds
23 that CPLC cannot satisfy the three factors articulated by Thomas
24 regarding the constitutional component.

25 Since CPLC cannot satisfy the constitutional component of
26 ripeness, it is unnecessary to consider the prudential component.

27 ///

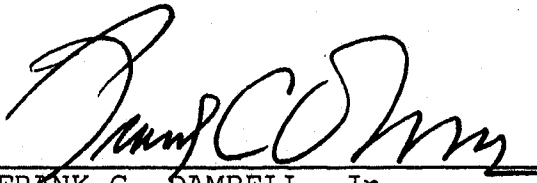
28 ///

1 **CONCLUSION**

2 Since the constitutional case or controversy requirement of
3 ripeness cannot be satisfied, CPLC's motion for summary judgment
4 is DENIED and Defendants' motion for summary judgment is GRANTED.
5

6
7 IT IS SO ORDERED.

8 DATED: January 17, 2002.
9


10 FRANK C. DAMRELL, Jr.
11 UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
for the
Eastern District of California
January 22, 2002

* * CERTIFICATE OF SERVICE * *

2:00-cv-01698

CA ProLife Council

v.

Getman

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on January 22, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

James F Sweeney
Law Offices of James F Sweeney
400 Capitol Mall
Suite 900
Sacramento, CA 95814

MP/FCD

James Bopp Jr
PRO HAC VICE
Bopp Coleson and Bostrom
One South Sixth Street
Terre Haute, IN 47807-3510

Richard E Coleson
PRO HAC VICE
Bopp Coleson and Bostrom
One South Sixth Street
Terre Haute, IN 47807-3510

Deborah L Allison
Fair Political Practices Commission
428 J Street
Suite 800
Sacramento, CA 95814

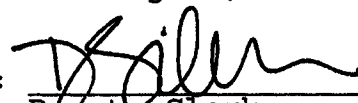
Lawrence Thomas Woodlock
Fair Political Practices Commission

428 J Street
Suite 800
Sacramento, CA 95814

Andrea Lynn Hoch
Attorney General's Office of the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Robert Edward Leidigh
Attorney General's Office of the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Jack L. Wagner, Clerk

BY: 
Deputy Clerk